9th Circuit No. 10-55879
S199639

IN THE SUPREME COURT OF CALIFORNIA
En Banc

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Plaintiff and Appellant,

v.

MICHAEL GARCIA, AN INDIVIDUAL,
Defendant and Appellee.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE IN SUPPORT OF PLAINTIFF LOS ANGELES UNIFIED SCHOOL DISTRICT

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

The California School Boards Association (CSBA) and its Education Legal Alliance (Alliance) respectfully request leave to file the attached amicus curiae brief in the captioned case. (Cal. Rules of Court, rule 8.520(f).) The brief supports the position of Plaintiff Los Angeles Unified School District.

CSBA is a nonprofit, membership organization comprised of school districts and county boards of education. CSBA membership includes nearly all of California's 1,000 school districts and 58 county boards of education.

CSBA's mission includes promoting success for all students by defining and driving the public education agenda and strengthening school board governance at the district and county levels. CSBA implements this mission in part by developing, communicating, and advocating the perspective of California school districts and county offices of education.

CSBA is the only statewide organization representing the school board/governance perspective in strengthening and promoting public education and ensuring high levels of student achievement. In turn, the Alliance initiates and supports litigation in cases of statewide significance in the courts and before state agencies. The Alliance joins in litigation

whose outcome might adversely affect school governance and public education.

This Court has previously granted CSBA and the Alliance leave to submit amicus curiae briefs in cases such as the captioned matter where the Court's decision will have far-reaching legal, logistical, and fiscal impacts on the provision of education to California's children.

CSBA and the Alliance are familiar with the captioned case and the issues briefed by the parties. The attached brief reflects CSBA's and the Alliance's interest in aiding the Court's analysis of the important issue before it. CSBA and the Alliance submit they have acquired knowledge and perspective regarding the provision of special education and related services in California that would assist this Court in considering the issue before it.

No party or counsel for a party has authored any part if this brief. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than CSBA, its members, and its counsel of record.

BENEFIT AND PURPOSE OF ADDITIONAL BRIEFING

The Court is addressing a matter of statewide significance for each of the 1,000 school districts in California. The Court's ruling has potential to cause far-reaching administrative and fiscal impacts that would impair school districts' abilities to provide meaningful and legally compliant

public education to their students. To assist the Court in its evaluation of the critical issue before it, CSBA and the Alliance submit a true "friend of the court" brief borne of their expertise in and knowledge of the federal Individuals with Disabilities Education Act, California's special education laws, and the myriad issues involved in providing mandated special education and related services.

Although CSBA and the Alliance support Plaintiff's position in the captioned matter, their brief does not augment or reiterate the Plaintiff's arguments. Instead, it supplements and complements Plaintiff's arguments by presenting a comprehensive perspective grounded in the legal framework within which the subject statute (Education Code section 56041) was enacted and currently exists.

For the foregoing reasons, CSBA and the Alliance respectfully request leave to file the attached amicus curiae brief.

Dated: _____

Respectfully Submitted,

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AMICUS CURIAE BRIEF

I. QUESTION PRESENTED

At the request of the United States Ninth Circuit Court of Appeals, the Court certified the following question for briefing:

> Does California Education Code § 56041 – which provides generally that for qualifying children ages eighteen to twenty-two, the school district where the child's parent resides is responsible for providing special education services – apply to children who are incarcerated in county jails?[1]

(California Supreme Court Order filed March 28, 2012, in *Los Angeles Unified School District v. Michael Garcia*, 2012 Cal. LEXIS 2948, granting request in *Los Angeles Unified School District v. Michael Garcia,* 669 F.3d 956, 958 (9th Cir 2012).)

II. INTRODUCTION AND SUMMARY OF ARGUMENT

No, Section 56041 does not apply to children incarcerated in county jails.

California has failed to explicitly designate the entity responsible for providing special education and related services to students incarcerated in

[1] The question presented by the Court uses the term "children" for individuals 18 through 21. This use is consistent with the terminology used throughout the Individuals with Disabilities Education Act. However, California's Education Code generally identifies this class of individuals as "adults" or "prisoners." (See, e.g., Ed. Code, §§ 1900 – 1909.5 [giving specified entities the option of providing education to "prisoners" in jails], 41840 – 41841.8 [re average daily attendance of "adults" in adult correctional facilities], 52514 [allowing high schools in county jails for "adults"].) This brief uses the term "children" as appropriate to maintain consistency with the question presented, while referencing the applicable California provisions that use differing terms to describe the "children" contemplated by the question presented.

county jails. Section 56041, alone or in combination with other pertinent statutes, provides no cure for this omission. In addition, California has not established by way of statute or regulations just how special education and related services can be provided to children in county jails.

As discussed below, the legislative framework within which Section 56041 was enacted and pertinent post-enactment provisions establish no intended or actual connection between Section 56041 and children incarcerated in county jails. Even assuming such connection, Penal and Government Code provisions vest county sheriffs and county corrections officials with exclusive administrative control over jails; thus, school districts may only gain direct access to incarcerated children at the sole discretion of these individuals.

Access, however, is meaningless without statutorily mandated interagency agreements that (1) delineate responsibilities and reconcile conflicts between penalogical interests and requirements of special education laws and (2) relieve school districts from the untenable position of having no leverage or bargaining power in negotiating and tendering consideration for agreements essential to providing special education and related services.

Similar statutorily mandated contract terms are necessary even if school districts may contract for other public agencies to service the incarcerated children. Because these agencies have no legal duty to provide

special education and related services to these children, their acts and omissions could not otherwise be challenged under related IDEA and state due process laws, thereby exposing school districts to liability even when county jail officials take legitimate actions to respond to penal and safety interests.

The Legislature adopted no laws requiring or governing these essential agreements.

A. Section 56041 and Its Specially Defined Terms

Section 56041 is one of several statutes implementing California's special education laws and the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. §1400 et seq.) It states:

> Except for those pupils meeting residency requirements for school attendance specified in subdivision (a) of Section 48204[2], and notwithstanding any other provision of law, if it is determined by the individualized education program team that special education services are required beyond the pupil's 18th birthday, the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, shall be assigned, as follows:
>
> (a) For nonconserved pupils, the last district of residence in effect prior to the pupil's attaining the age of majority shall become and remain as the responsible local educational agency, as long as and until the parent or parents

[2] This exception does not apply to children incarcerated in county jails. Instead, it addresses pupils placed within a regularly established licensed children's institution, or a licensed foster home, or a family home pursuant to a commitment; with approved interdistrict transfer agreements; whose parent or legal guardian is relieved of responsibility, control, and authority through emancipation; who live in the home of a caregiving adult; or who reside in a state hospital. (Ed. Code, § 48204, subd. (a).)

> relocate to a new district of residence. At that time, the new district of residence shall become the responsible local educational agency.
>
> (b) For conserved pupils, the district of residence of the conservator shall attach and remain the responsible local educational agency, as long as and until the conservator relocates or a new one is appointed. At that time, the new district of residence shall attach and become the responsible local educational agency.

California law guarantees students with disabilities a free appropriate public education (FAPE) that includes *special education* and *related services*. Providing FAPE involves a recurring, multi-faceted process that encompasses a broad range of activities including identifying potentially eligible pupils ("child find"); determining eligibility and making recommendations for appropriate services; evaluating and reevaluating pupils using a variety of assessment tools and strategies; developing an IEP that identifies the special education and related services tailored to the pupil's unique needs; making school and class placement decisions; ensuring the education and services; monitoring, consistent with the IEP; and, performing regular reviews to track the pupil's progress. (See, e.g., 20 U.S.C. §§ 1412, 1414, 1415.)

Special Education. Special education is defined as "specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs, including instruction conducted in the classroom, in the home, in hospitals and institutions, and other settings, and

instruction in physical education." (Ed. Code, § 56031, subd. (a); see also 20 U.S.C. § 1401(29).) Special education may also include related services, travel training, and vocational training. (Ed. Code, § 56031, subd. (b); see also 34 C.F.R. § 300.39.) Transition services are special education if provided as specially designed instruction or a related service and, required to help benefit from special education. (Ed. Code, § 56031, subd. (c); see also 34 C.F.R. § 300.43.)

Related Services. By definition, related services are transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable an individual with exceptional needs to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation, and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist an individual with exceptional needs to benefit from special education. (Ed. Code, § 56363, subd. (a).) Related services include language and speech development and remediation; audiological services; orientation and mobility services; instruction in the home or hospital; adapted physical

education; physical and occupational therapy; vision services; specialized driver training instruction; counseling and guidance services, including rehabilitation counseling; psychological services other than assessment and development of the individualized education program; parent counseling and training; health and nursing services; social worker services; specially designed vocational education and career development; recreation services; specialized services for low-incidence disabilities, such as readers, transcribers, and vision and hearing services; and, interpreting services. (Ed. Code, § 56363, subd. (b); see also 20 U.S.C. § 1401(26).)

Individualized Education Program. A student's individualized education program (IEP) identifies the special education and related services tailored to the student's unique needs. An IEP is, in pertinent part,

> a written document described in Sections 56345 and 56345.1 for an individual with exceptional needs that is developed, reviewed, and revised in a meeting in accordance with Sections 300.320 to 300.328, inclusive, of Title 34 of the Code of Federal Regulations and this part...

(Ed. Code, § 56032; see also Ed. Code, § 56345 [specifying IEP content].)

B. State Duty to Provide Special Education and Related Services.

At all relevant times, the IDEA required states receiving related federal funds to provide special education and related services to eligible children aged 3 through 21, including children incarcerated in adult correction facilities. (20 U.S.C. § 1412 (a)(1)(A), (B); 34 C.F.R. §§ 300.2,

300.102 (a)(2).) States determine for themselves whether they, a local educational agency (e.g., school district, county office of education, or special education local plan area), or another local agency will provide the required special education and related services. (*Id.*; see also 71 Fed. Reg. 46686 (Aug. 14, 2006); see also 20 U.S.C. § 1401(19) & Ed. Code, § 56026.3 [providing definitions of local educational agency].) In 1997, Congress amended the IDEA to clarify that the state could, but is not required to, look to non-educational agencies to pay for or provide those services for which the educational agencies are otherwise responsible. (Sen. Rep. 105-17, 1st Sess. (1997), http://www.specialed.us/discoveridea/senaterep.htm.) In doing so, the IDEA requires that states set forth interagency agreements or other explicit mechanisms for delineating interagency coordination and ensuring compliance with the IDEA. (20 U.S.C. § 1414(a)(12).)

California has failed to explicitly designate the entity responsible for providing special education and related services to students incarcerated in county jails. Section 56041, alone or in combination with other pertinent statutes, provides no cure for this omission.

III. ARGUMENT

A. California's Legislature Enacted Section 56041 Within a Legal Framework that Overlooked Education for Children Incarcerated in County Jails and Perpetuated this Omission in Subsequent, Pertinent Additions to California's Laws

When a statute's language is clear and unambiguous, construction and reference to legislative intent are generally unnecessary. (*Lundgren v. Deukmejian* (1998) 45 Cal.3d 727, 735.) Such actions are warranted, however, when as here, literal application of a statute would produce untenable consequences. (*Id.*) Indeed, "[i]f the legislative purpose and intent cannot be ascertained from the ordinary and proper meaning of the statutory language itself, the statute may then be read in light of its historical background, in an attempt to ascertain the most reasonable interpretation of the measure." (58 Cal. Jur. (3d ed. 2012), Statutes, §112, p. 528.)

Although school districts generally provide special education and related services to students whose parents reside within district boundaries, the plain language of Section 56041 makes no mention of children incarcerated in county jails. (Ed. Code, §§ 48200 [compulsory education laws], 48204 [school district residency laws]; see also 20 U.S.C. § 1414(d)(2)(A).) When the Legislature added Section 56041 in 1992, California law contained no mandate for any agency to educate children

aged 18 to 22 incarcerated in county jails.[3] Instead, an Education Code article titled "Education of Prisoners," contained laws that explicitly authorized – but did not require – county superintendents of schools (with the approval of the respective county board of education and the county board of supervisors) and county boards supervisors to establish jail-related schools and, sheriffs and other officials in charge of county correctional facilities to provide for rehabilitation that emphasizes education. (Ed. Code Tit. 1, Div. 1, Part 2, Ch. 6, Art. 14.5 [entitled "Education of Prisoners"], §§ 1900, 1905, 1906, 1907.) School districts were not among these authorized entities.

When the Legislature enacted Section 56041, the relevant legal framework also included pertinent Penal and Government Code provisions. These codes vested county sheriffs with exclusive control over county jail

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[3] It was not until the 2004 amendment to Education Code section 56040 that the Legislature stated:

> An individual, aged 18 through 21 years, who, in the educational placement prior to his or her incarceration in an adult correctional facility was not identified as being an individual with exceptional needs or did not have an individualized education program under this part, is not entitled to a free appropriate public education pursuant to Section 1412(a)(1)(B)(ii) of Title 20 of the United States Code.

(Ed. Code, § 56040, subd. (b); added by Stats 2004, c. 161 (A.B. 152), § 3, eff. July 16, 2004.) Even so, the Legislature failed to connect this statement with an explicit duty of any local agency for the provision of special education and related services to children incarcerated in county jails.

administration and inmates, and did substantially the same thing for officials in charge of county corrections departments. (Pen. Code, § 4000; Gov. Code, §§ 23013, 26605.) Neither county sheriffs nor officials in charge of county corrections departments had a duty to educate incarcerated children. (See Pen. Code, § 4018.5; Ed. Code, § 1905 [individually and collectively authorizing sheriffs and officials in charge of county corrections departments to provide vocational training, rehabilitation, and adult education to inmates, subject to county boards of supervisors' approval].) Nor were they explicitly compelled to work in partnership with state or local educational agencies that might wish to provide this education.

At most, statutes imposed an implied obligation on sheriffs and corrections department officials to cooperate with county superintendents of schools and county boards of supervisors, should the latter elect to establish and maintain jail-related schools or classes. (Ed. Code, §§ 1900, 1906, 1907.) In turn, if a school district exercised its statutorily granted discretion to serve as a county board's agent in maintaining such schools or classes, it would be equally (implicitly) entitled to cooperation from sheriffs or county corrections officials. (Ed. Code, §§ 1906, 1907.)

Education Code sections 1906 and 1907 stood alone in explicitly contemplating school district involvement in the education of county jail inmates. Yet, they gave school districts nothing more than an optional,

supporting role. Even when supplemented by Education Code section 35160, Section 56041 did not vest school districts with necessary authority to educate children incarcerated in county jails. Section 35160 authorized a school district governing board to initiate and carry on any program, activity, or otherwise act in a manner "not in conflict with or inconsistent with, or preempted by, any law and ... not in conflict with the purposes for which school districts are established." Notwithstanding this broad authority granted under the Education Code, pertinent Penal and Government Code provisions made it clear that school districts could provide special education and related services to county jail inmates only if allowed by sheriffs and county corrections officials. The law presumes the Legislature knew of the relevant legal framework when it enacted Section 56041 and if it intended to alter this framework, direct and explicit action regarding children incarcerated in county jails was required. (*Stone Street Capital, LLC v. California State Lottery Com.* (2008) 165 Cal.App.4th 109, 120.)

In fact, California State Archives records include a document showing that the intended beneficiaries of Section 56041 did not include children incarcerated in county jails. The document states in pertinent part:

> This proposed amendment adds a new code section clarifying the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, for nonconserved pupils and conserved pupils. *This addresses a problem for local*

> *educational agencies which are impacted by nonpublic, nonsectarian schools.* The amendment was recommended by the Santa Barbara County SELPA.

("Education Code Sections Contained in Assembly Bill 2773," p. 2 [from State Archives Senate Education Committee file, AB 2773, 1992]; emphasis added; attached as Exhibit A.)

The referenced problem arose from shifting school district responsibilities to provide special education and related services when a student was placed by one district in an out-of-district nonpublic school. (See e.g., *Student v. Berkeley Unified Sch. Dist. and Albany Unified Sch. Dist.,* SN 03-01989 (Cal. Special Educ. Hearing Office, Nov. 6, 2003.) The placing district had responsibility for providing and paying for the education until the student became an adult, at which time the adult student became a "parent" under then-current law. Once the student became a "parent," this responsibility transferred to the district in which the out-of-district, non-public school was located. Section 56041 limited the transferee district's responsibilities.

Thus, the plain language and legislative history of Section 56041, and the legal framework within which it was added, show no intended or actual connection between Section 56041children subject to conservatorship and children incarcerated in county jails. Decisional law

does not compel an alternate conclusion.[4] Nor could it in view of the additional, pertinent special education laws added by the Legislature beginning 1997, which continued to ignore children incarcerated in county jails. (See, e.g., *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195 [quoting *Eu v. Chacon* (1976) 16 Cal.3d 465, 470 as stating "Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed."].)

In particular, beginning with 1997 enactments, the Education Code required special education local plan areas (SELPAs) to prepare and administer local plans approved by the State Superintendent of Schools. (Ed. Code, § 56195 ; see also Ed. Code, § 56195.1, subd. (d) [defining a SELPA as the service area covered by a local plan].) A local plan is a written plan submitted by a single school district, two or more school districts, or one or more school districts together with one or more county

[4] Prior to the pending action between Los Angeles Unified School District and Mr. Garcia, only one appellate court decision considered the purpose and effect of Section 56041: *Orange County Dept. of Educ. v. California Dept. of Educ.*, 668 F.3d 1052, 1057, fn. 5 (9th Cir. 2011).) Neither this decision nor nonbinding California Special Education Hearing Office decisions referenced therein and by Plaintiff's and Defendant's briefs, address the question presently before the Court or the above-discussed legal framework within which the Legislature added Section 56041.

offices of education. (Ed. Code, § 56027; see also Ed. Code, §§ 56195 et seq. [specifying SELPA composition and its duties in adopting a local plan], 56205 et seq. [specifying local plan contents].)

Each SELPA was to ensure that the local plan gives effect to policies, procedures, and programs consistent with the IDEA and state law, and their implementing regulations and policies. (Ed. Code, § 56205, subd. (a).) Related annual service plans were to address special education and related services for children in juvenile court schools and other alternative programs. The law provided in pertinent part:

> An annual service plan shall be adopted at a public hearing held by the special education local plan area. ... The annual service plan shall include a description of services to be provided by each district and county office, including the nature of the services and *the physical location at which the services will be provided, including alternative schools, charter schools, opportunity schools and classes, community day schools operated by districts, community schools operated by county offices, and juvenile court schools,* regardless of whether the district or county office is participating in the local plan. This description shall demonstrate that all individuals with exceptional needs shall have access to services and instruction appropriate to meet their needs as specified in their individualized education programs.

(Ed. Code, § 56205, subd. (b)(2), italics added.) This provision is consistent with the Legislature's explicit requirement for providing special education programs to children in juvenile court schools and halls, ranches and camps, and county community schools. (Ed. Code, § 56150.) The provision

is also consistent with the Legislature's continuing failure to require education for children incarcerated in county jails.

Thus, laws pre- and post- Section 56041 enactment show that Section 56041 was not, and is not, aimed toward or inclusive of children incarcerated in county jails.

B. Assuming Section 56041 Applies to Children Incarcerated in County Jails, Direct Access to These Children is Meaningless Without Statutorily Mandated Interagency Agreements that Ensure Full Compliance with the IDEA and California's Special Education Laws

The above-discussed Penal, Government, and Education Code sections relating to jail-related education exist today essentially as they did when the Legislature enacted Section 56041 in 1992. None have been supplemented with additional or amended statutes that explicitly impose on school districts the duty and authority necessary provide special education and related services to children incarcerated in county jails.

Even so, assuming the application of Section 56041 and school district access to incarcerated children, compliance with federal and state special education law requires the certainty and protections of a mandated interagency agreement or other explicit mechanism for ensuring compliance with the IDEA. The IDEA specifically references the need for interagency agreements when states require public agencies to work together in some manner to provide required special education and related

services. (20 U.S.C. § 1414(a)(12).) The interagency agreements or mechanisms must delineate the interagency coordination responsibilities for the timely and appropriate delivery of special education and related services, the financial responsibility of each agency for the provision of FAPE, the procedures for resolving interagency disputes, and the conditions, terms and procedures under which an LEA shall be reimbursed by other agencies for the cost of services. (*Id.*)

Similarly, the California Legislature has long required interagency agreements between educational agencies and public agencies to delineate respective duties for ensuring provision of special education and related services, but it created no such requirement for school districts educating children incarcerated in county jails. (See, e.g., Cal. Code Regs., tit 5., § 3000 [explaining that California's regulations for special education do not relieve any other agency from an otherwise valid obligation to provide or pay for services for individuals with exceptional needs and stating that "[c]larification and specificity of responsibilities shall be included in but not limited to interagency agreements]; Gov. Code, § 7587 [requiring specified state departments and local agencies to develop implementing regulations that govern their statutorily-mandated interrelated duties to provide special education and related services]; Gov. Code, § 95009 [requiring promulgation of joint regulations among the Department of Developmental Services and the Department of Education for the provision

of special education and related services].) For example, Section 60030 of Title 2 of the California Code of Regulations, when in it was in effect, required community mental health agencies and each SELPA within the respective county to enter into an interagency agreement that included, but was not limited to, procedures for monitoring compliance with special education timelines, resolving interagency disputes, delivering completed assessment referral packages, developing of assessment plans, participating at IEP meetings, developing and revising of IEPs, providing special education and related services, transporting students to services, providing space and support staff at sites where services are provided, placing students in residential facilities, and providing staff development. (Cal. Code Regs., tit. 2, § 60030.)

Because no provision of law exists that requires interagency agreements between school districts and county sheriffs or county corrections officials, school districts would unreasonably be required (with virtually no bargaining power) to negotiate, tender consideration for, and implement interagency agreements to access students in county jails that may well prevent them from fully satisfying federal and state special education laws. Summary review of the IDEA's requirements for the provision of FAPE underscores the inevitability of this outcome faced by school districts to provide FAPE in a county jail setting.

The IDEA exists to address historical deficiencies in the provision of education to children with disabilities. (20 U.S.C. § 1400(d).) Congress expressed particular concern that prior to the IDEA, these children were effectively segregated from the public school setting and their peers, denied educational opportunities, and not properly diagnosed. (20 U.S.C. § 1400 (c), (d).) With the IDEA, Congress sought to make the paradigmatic public school setting in which preschool, elementary, and secondary school education is provided, accessible to children with disabilities. (*Id.*) Recognizing that the nature and feasibility of such access is dependent upon the unique needs of each student – and not the capabilities of the school district – Congress enacted several procedural and substantive provisions to effect its purposes.

Chief among the substantive provisions is the requirement for states to make a FAPE available to children with disabilities that emphasizes special education and related services designed to meet their unique needs. (20 U.S.C. § 1400(d)(1)(A).) FAPE must be provided at public expense, under public supervision and direction, and without charge; meet the state educational agency's standards; include an appropriate preschool, elementary school, or secondary school education; and, be provided according to a child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; see also Cal. Code Regs., tit.5, § 3001, subd. (p).)

As noted above, providing FAPE involves a recurring, multi-faceted process, sometimes including coordination among several agencies, that encompasses a broad range of activities including identifying potentially eligible pupils ("child find"); determining eligibility and making recommendations for appropriate services; evaluating and reevaluating pupils using a variety of assessment tools and strategies; developing an IEP that identifies the special education and related services tailored to the pupil's unique needs; making school and class placement decisions; ensuring the education and services; monitoring, consistent with the IEP; and, performing regular reviews to track the pupil's progress. (See, e.g., 20 U.S.C. §§ 1412, 1414, 1415.)

FAPE must also be provided in the least restrictive environment. This means that each public agency with a duty under the IDEA must ensure to the maximum extent possible that children with disabilities are educated with children who are not disabled. Placing a child in special classes or separate schooling, or removing the child from the general education environment is allowed only if the nature or severity of the disability "is such that education in regular classrooms with the use of supplementary aids and services cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A).) In other words, the expected setting for children with disabilities is the regular classroom in which general education curriculum is presented according to state standards.

California implements the rigors of the IDEA with many statutory requirements, including a mandate for SELPAs to ensure a continuum of program options to meet special education and related services needs under the required local plan. (Ed. Code, §§ 56001, subd. (f), 56361.) The continuum must include legally compliant regular education programs; a legally compliant resource specialist program; designated instruction and services (i.e., "related services") as defined by the IDEA and its implementing regulations; special classes that serve children with similar and more intensive educational needs; nonpublic, nonsectarian school services; state special schools; instruction settings other than in classrooms where specially designed instruction may occur; itinerant instruction in classrooms, resource rooms, and settings other than in classrooms where specially designed instruction may occur; and, instruction using telecommunication, and instruction in the home, hospitals, and other institutions as may be required by the IDEA. (Ed. Code, § 56361.)

Children incarcerated in county jails are entitled to this same continuum of program options and all other federal and state requirements for FAPE in the least restrictive environment. These requirements mandated for children in county jails stand in stark contrast to the explicit exceptions of the IDEA for children convicted as adults and incarcerated in adult prisons. Under the IDEA, these children are not entitled to participate in general assessments and their IEP team may only modify their IEP or

placement if the state has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated. (20 U.S.C. § 1414(d)(7)(A)(i), (B).) Some of these children are not entitled to transition planning and transition services. (20 U.S.C. § 1414(d)(7)(A)(ii).) Further, under the IDEA, a state's governor may assign to *any public agency* in the State the responsibility of ensuring that requirements of the IDEA are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. (20 U.S.C. 1412 (a)(11)(C).)

Compliance with IDEA requirements for providing FAPE in county jails involves far-reaching impacts to jail administration and facilities. Implementing "child find" requirements and complying with the duty to provide special education and related services without undue delay, provides but a few examples of these impacts. "Child find" refers to a school district's affirmative obligation to identify, locate, and evaluate all eligible children with disabilities residing in their jurisdiction who have disabilities and need special education and related services or are suspected of having disabilities. (20 U.S.C. § 1412(a)(3); 34 C.F.R. §§ 300.125.) For school districts to find eligible incarcerated children, sheriffs and corrections officials must establish a process that provides the school districts prompt notification of the child's incarceration and equally swift access to the child. The school district must then assess, assemble a legally constituted IEP team, determine eligibility, develop an IEP, and begin

implementing the IEP within 60 days of receiving consent to assess the student. (See, e.g., Ed. Code, §§ 56043, 56344.)

If a student enters a county jail with an existing IEP, a school district must, at minimum, immediately implement and then adopt the child's existing IEP, or develop, adopt, and implements a new one within 30 days. (See, e.g., Ed. Code, § 56325 [provisions applicable to children transferring within state or from out of state into a new school or school district].) Section 56325 provides in pertinent part:

> (a)(1) . . . the following shall apply to special education programs for individuals with exceptional needs who transfer from district to district within the state. In the case of an individual with exceptional needs who has an individualized education program and transfers into a district from a district not operating programs under the same local plan in which he or she was last enrolled in a special education program within the same academic year, the local educational agency shall provide the pupil with a free appropriate public education, including services comparable to those described in the previously approved individualized education program, in consultation with the parents, for a period not to exceed 30 days, by which time the local educational agency shall adopt the previously approved individualized education program or shall develop, adopt, and implement a new individualized education program that is consistent with federal and state law.
>
> (2) In the case of an individual with exceptional needs who has an individualized education program and transfers into a district from a district operating programs under the same special education local plan area of the district in which he or she was last enrolled in a special education program within the same academic year, the new district shall continue, without delay, to provide services comparable to those described in the existing approved individualized education

> program, unless the parent and the local educational agency agree to develop, adopt, and implement a new individualized education program that is consistent with federal and state law.

(Emphasis added.)

Beyond these requirements, depending upon what each incarcerated student's IEP requires – *based on his or her unique needs* – for school districts to ensure the provision of FAPE to these students, they must have available in the county jails the full continuum of program options, including legally compliant regular education programs, a legally compliant resource specialist program, designated instruction and services, and instruction settings other than in classrooms where specially designed instruction may occur. (Ed. Code, § 56361.) At the very least, this necessitates one or more general education classrooms; areas separate from the general education classroom for possible one-on-one or small group instruction; areas for the child to meet with evaluators, the IEP team, and other support and service providers as necessary; the child's use of educational implements and materials, including pencils; and, so on.

Sheriffs and county corrections departments have no duty or known incentive to substantially modify jail administration and facilities to further school district compliance with special education laws. Legislative intervention requiring the interagency agreements and specifying their terms is essential to pave the way to school district compliance and to

reconcile the inherent tension between penalogical interests and jail administration on the one hand, and special education laws on the other. But, in the absence of this intervention, if Section 56041 applies to children incarcerated in county jails, schools districts would have a duty to educate with no reasonable means of satisfying it.

C. Assuming Section 56041 Applies to Children Incarcerated in County Jails, Contracting for Another Public Agency to Provide the Special Education and Related Services Would Be Futile Absent a Legislative Mandate that Ensures Full Compliance with Special Education Laws and Holds the Contracting Agency Equally Responsible for Compliance

In the absence of State legislative intervention requiring corrections authorities to collaborate with school districts in the provision of FAPE and identifying the necessary components of an interagency agreement between the two agencies, in theory, one possible means for a school district to access and provide a FAPE to students incarcerated in county jails may be through a service contract for special education through the county of superintendent of schools or county board of supervisors. Education Code section 56369 authorizes school districts to contract with another public agency to provide special education and related services to an individual with exceptional needs. Within the meaning of Section 56369, a public agency is a school district, county office of education, special education local plan area, specified nonprofit public charter school, or any other public agencies "under the auspices of the state or any political

subdivisions of the state providing special education or related services to individuals with exceptional needs." (Ed. Code, § 56028.5.)

Notably, as discussed above, California law only authorizes, but does not mandate, two of these agencies to establish schools and classes in connection with county jails: county superintendents of schools (with the approval of the respective county board of education and the county board of supervisors) and county boards of supervisors. (Ed. Code, §§ 1900, 1906, 1907.)[5] No provision of law places a duty on these county persons or entities to provide students with disabilities in county jails with a FAPE. Thus, a service contract with a county of superintendent of schools or county board of supervisors ("Contracting Agency") for the provision of FAPE to students incarcerated in county jails would necessarily require, at a minimum, the contracting agency to have already (1) provided for the establishment of classes or schools in the jail facilities, and (2) included in the menu of educational programs a full continuum of special education placement and related service options that is provided by qualified

[5] The Ninth Circuit suggests that Section 56369 would allow school districts to contract with other school districts to provide special education under Section 56041. (*Los Angeles Unified Sch. Dist. v. Garcia*, 669 F.3d 956, 962 (9th Cir. 2012).) This suggestion presumes another school has access to incarcerated children. School districts have no explicit statutory right of access. At best, they may access inmates to provide special education and related services at the sole discretion of jail administrators and in that case, the discussions presented above in Sections B and C would be equally applicable.

personnel in compliance with federal and State special education law.

Even assuming all of these procedures had occurred and special education is available for students incarcerated in county jails through the Contracting Agency with which a school district may contract, because neither Section 56369 nor the Education Code's implementing regulations specify the necessary terms for the contract, school districts would be left to negotiate and tender consideration for contracts that potentially facilitate provision of special education and related services, but that compromise other significant school district interests.

The circumstances warranting the contract are similar to those for placing a student in a nonpublic, nonsectarian school or agency; i.e., the school districts cannot provide the required special education and services themselves. The Education Code addresses this circumstance by requiring school districts and nonpublic, nonsectarian schools or agencies to enter into "master contracts" that delineate respective duties, which include the contracting party (i.e., nonpublic schools/agencies) to provide all services provided in the IEP unless the parties otherwise agree in writing. (Ed. Code, § 56366, subd. (a).) In particular, Section 56366 provides in pertinent part:

> (a) The master contract for nonpublic, nonsectarian school or agency services shall be developed in accordance with the following provisions:
>
> (1) The master contract shall specify the general administrative

and financial agreements, including teacher-to-pupil ratios, between the nonpublic, nonsectarian school or agency and the local educational agency to provide the special education and designated instruction and services, as well as transportation specified in each pupil's individualized education program. ...

(2) (A) The master contract shall include an individual services agreement for each pupil placed by a local educational agency that will be negotiated for the length of time for which nonpublic, nonsectarian school or agency special education and designated instruction and services are specified in the pupil's individualized education program.

(B) The master contract shall include a description of the process being utilized by the local educational agency to oversee and evaluate placements in nonpublic, nonsectarian schools, as required by federal law. This description shall include a method for evaluating whether each pupil is making appropriate educational progress. ... to the extent possible, the following shall be conducted as part of the development and provision of an individualized education program:

(i) Evaluate the educational progress of each pupil placed in a nonpublic, nonsectarian school, including all state assessment results pursuant to the requirements of Section 52052.

[¶]

(3) Changes in educational instruction, services, or placement provided under contract may only be made on the basis of revisions to a pupil's individualized education program. ....

(4) The master contract or individual services agreement may be terminated for cause. ...

(5) The nonpublic, nonsectarian school or agency shall provide all services specified in an individualized education program, unless the nonpublic, nonsectarian school or agency and the local educational agency agree otherwise in the contract or individual services agreement.

(6) Related services provided pursuant to a nonpublic, nonsectarian agency master contract shall only be provided during the period of a pupil's regular or extended school year program, or both, unless otherwise specified by the pupil's individualized education program.

...

Most, if not all, of these duties must also apply to special education services provided on a school district's behalf by a Contracting Agency. This would protect the school district's interests and would empower school districts with the oversight necessary to ensure compliance with federal and state special education laws. However, service contracts are voluntary, and there is no requirement or obligation for a contracting agency to enter into such a contract with a school district. Without similar statutory requirements specifying the required terms of such service contracts with Contracting Agencies, school districts have no leverage to negotiate contracts that protect the students' rights and that allow them the ability to monitor the contracting agencies' compliance with the service contracts.

Moreover, one significant distinction between master contracts with nonpublic schools/agencies and potential service contracts with contracting agencies related to county jails is that the jails are primarily penalogical in nature rather than educational. Accordingly, circumstances may arise in which a Contracting Agency must deny an incarcerated student special education services to address a safety or other correctional issue within the jail. Such decisions, in the absence of school district involvement and an IEP team determination may result in the denial of FAPE to the student. As the ultimate entity responsible for the provision of FAPE, a school district

may be liable for such denials created by the Contracting Agencies. Any statutory scheme must account for shifting the liability away from the school district to a Contracting Agency and county jail officials for acts or omissions – even when such acts or omissions are related to legitimate safety and penalogical interests – that deny incarcerated children a FAPE.

Additionally, as solely a service provider, a contracting agency would not be subject to the due process provisions of the IDEA and comparable California law. Because they have no duty whatsoever to provide FAPE to children incarcerated in county jails, they are not "public agencies" subject to the IDEA's due process hearing procedures. (See, e.g., *Educ. Rep. on Behalf of Student v. Elk Grove Unified Sch. Dist., et al.,* OAH Case No. 2012061030 (Cal. Office of Admin. Hearings, Jul. 31, 2012.) Due process hearings are the principal fora for resolving disputes between parents of children with disabilities and school districts regarding the provision of FAPE in the least restrictive environment. (20 U.S.C. § 1415(b); 34 C.F.R. § 300.507; Ed. Code, § 56501.) Accordingly, school districts may be required at a due process hearing to defend actions of the contracting agencies over which they have no control.

In summary, while service contracts with county boards of supervisors present a potentially viable option, there is no known incentive for county boards of supervisors to provide for classes or schools in county jails with special education services, or to enter into these essential

contracts with school districts in the absence of a legislative mandate, funding, and related contractual guidance. Even assuming school districts and contracting agencies are able to enter into such contracts, potential implementation problems place school districts at substantial risk of liability without adequate due process procedures to defend themselves. Thus, if Section 56041 applies to children incarcerated in county jails, school districts would have a duty to provide special education and related services with no reasonable means of satisfying it.

IV. CONCLUSION

For the foregoing reasons, the California School Boards Association and its Education Legal Alliance respectfully submit that Section 56041 does not and cannot apply to children incarcerated in county jails.

V. CERTIFICATION OF WORD COUNT

Counsel of Record hereby certifies, pursuant to Rules 8.204(c) and 8.520(c) of the California Rules of Court, that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 6,891 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: _____

Respectfully Submitted,

VU VACCARO LLP

By: _____

Van T. Vu
Attorneys for Amicus Curiae California School Boards Association and its Education Legal Alliance

EXHIBIT A

EDUCATION CODE SECTIONS CONTAINED IN ASSEMBLY BILL 2773

EDUCATION CODE SECTION 41851.2

This proposed amendment would preclude the special education transportation guidelines required by AB 876 (Canella), Chapter 283, Statutes of 1991), for use by individualized education program teams from having to be approved by the Office of Administrative Law since the guidelines have to be in place by December 31, 1992.

EDUCATION CODE SECTION 48212

This proposed amendment would repeal an outdated code section relative to permitting local governing boards to exclude a child with a physical or mental disability from attendance from regular school when their disability is such as to cause their attendance to be inimical to the welfare of other pupils. Current laws governing the suspension and expulsion of special education pupils, as well as two federal court decisions, have replaced the need for this section. (See EC Sections 48900.5 and 48915.5)

EDUCATION CODE SECTIONS 48911, 48912, AND 48915.5

These proposed amendments are to further conform state law in accordance with federal judicial rulings in Doe v. Maher, 793 F.2d 1470 (1986), aff'd, Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L. Ed. 2d 686 (1988), except for (j) in 48915.5, relative to disabled pupils. These are further clarifications to AB 3080 (Farr), Chapter 1234, Statutes of 1990.

The proposed subdivision (j) of EC Section 48915.5 is to provide legislative clarification concerning the respective rights and responsibilities of pupils and local school officials relative to the suspension of a pupil from bus transportation. Since transportation is a related service under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 and following), transportation is a critical element of a pupil's individualized education program (IEP). So if a pupil is suspended from school bus transportation, the pupil is still entitled to be provided with an alternative form of transportation - if transportation is part of the pupil's IEP.

(Contact Person: Barry Zolotar, Deputy General Counsel, California Department of Education, 657-2453.)

EDUCATION CODE SECTION 56026

This proposed amendment to subdivision (a) is technical to conform to language in the federal Individuals with Disabilities Education Act.

The proposed changes to subdivisions (c)(4)(B), in the first instance, and (c)(4)(A), in the second instance, are to provide clarifying language to Assembly Bill 1060 (Farr), Chapter 223, Statutes of 1991. In the first instance, it clarifies what happens during the months of July and August, which was implied but not stated, and specifies that the 22 year-old student may complete an extended year program after July 1 if it is included in the individual's IEP. In the second instance, it clarifies what happens during the months of January to June, inclusive.

56041

EDUCATION CODE SECTION 56041

This proposed amendment adds a new code section clarifying the district of residence responsible for providing special education and related services to pupils between the ages of 18 to 22 years, inclusive, for nonconserved pupils and conserved pupils. This addresses a problem for local educational agencies which are impacted by nonpublic, nonsectarian schools. The amendment was recommended by the Santa Barbara County SELPA.

EDUCATION CODE SECTION 56100

This proposed amendment gives the responsibility to the State Board of Education to adopt rules and regulations regarding the ownership and transfer of materials and equipment, including facilities, related to transfer of program, reorganization, or dissolution of special education local plan areas.

EDUCATION CODE SECTION 56138

This proposed amendment adds a section to provide for a three-year pilot program, commencing in the 1993-94 fiscal year, to authorize public education agencies to establish an alternative dispute resolution process, the purpose of which will be to increase opportunities for parents and public education agencies to reach agreements regarding a free and appropriate public education for individuals with exceptional needs, prior to the initiation of state-level due process hearings. The pilot program would include developing the capability of public education agencies acquiring an ombudsperson, and/or mediator, and/or placement specialist - with the primary goal of assisting parents and the public education agencies in the resolution and settlement of disputes and assisting, when appropriate, in identifying and locating an appropriate educational placement or service for the pupil. The

pilot program shall not abrogate any right of the students or their parents or guardians. The Advisory Commission on Special Education and other appropriate groups, parents, and persons involved in the education of individuals with exceptional needs shall be consulted by the Superintendent of Public Instruction when the request for proposals for the pilot program is developed.

EDUCATION CODE SECTION 56164

This proposed amendment clarifies the application of the exclusionary provisions of the licensed children's institutions and foster family homes provisions of Article 5 (commencing with Section 56155) of Chapter 2 and Article 8.5 (commencing with Section 56775) of Chapter 7 of Part 30 of the Education Code applies to facilities owned or operated by regional centers for the developmentally disabled; or programs or facilities funded or vendorized by, or operating on the grounds of, or in the community by, state hospitals, developmental centers, or Department of Youth Authority programs. It also clarifies the agencies responsible for special education, related services and transportation costs for the residents of these facilities.

EDUCATION CODE SECTION 56171

This proposed amendment clarifies that when the local educational agencies involved in a special education local plan area intends to elect an alternative option for providing special education and related services in a geographical area that the California Department of Education, impacted special education local plan areas, and participating county offices of education be notified.

EDUCATION CODE SECTION 56321

This proposed amendment would clarify that the 15-day timeline for submitting a proposed assessment plan for the development of a pupil's individualized education program does not include days of school vacation in excess of five schooldays from the date of receipt of the referral. It further clarifies that in any event, the assessment plan shall be developed within ten days after the commencement of the subsequent regular school year or pupil school term as determined by each district's school calendar for each pupil for whom a referral has been made 10 days or less prior to the end of the regular school year. In the case of pupil school vacations, the 15-day time shall recommence on the date that pupil schooldays reconvene.

EDUCATION CODE SECTION 56337.5

This proposed amendment would add a code section to clarify that if a pupil who is assessed as being dyslexic and meets eligibility criteria as specified for the disability category of "specific learning disabilities," is entitled to special education. This does not expand nor change any eligibility criteria. The provision also clarifies that if a pupil who exhibits characteristics of dyslexia, or another related reading dysfunction, and is not found to be eligible for special education and related services, the pupil's instructional program shall be provided in the regular education program as is required under the compulsory education attendance law. The provision also includes legislative intent language about making available the program guidelines for specific learning disabilities, required to be developed by Chapter 1501, Statutes of 1990, for use by teachers and parents.

EDUCATION CODE SECTION 56339 (ARTICLE 2.6, CHAPTER 4)

This proposed addition to special education law is to clarify the role of special education/related education in the provision of educational services to pupils with attention deficit disorders (ADD) and attention deficit hyperactivity disorders (ADHD). Under the federal Individuals with Disabilities Education Act (IDEA), pupils with ADD or ADHD who meet eligibility criteria for special education under the disability categories - other health impaired, seriously emotionally disturbed, and specific learning disabilities - are to be served in special education.

Three U.S. Assistant Secretaries of Education, last September, sent a letter to all state school chiefs and state directors of special education, clarifying the federal policy on special education law to ensure that schools serve pupils with ADD/ADHD. The September 16 memo said that ADD pupils not deemed eligible for special education may find recourse under Section 504 of the 1973 Rehabilitation Act, which prohibits discrimination against disabled people in federal programs. Section 504's protections are broader than those of Part B of IDEA and extend to some pupils who do not fall within the disability categories specified in Part B.

The proposed Section 56339 says if those pupils meet special education eligibility criteria they are to be served in special education; if they don't meet special education eligibility criteria, they must be served in regular education. These children must not fall through the cracks because they need educational interventions.

Section 504 is not a funding program. Part B of IDEA includes funding with the program elements. IDEA and Part 30 of the Education Code require pupils to be eligible for special education in order to receive special education funding. Under the state compulsory education attendance law, regular education programs would have to serve the ADD/ADHD children not eligible for special education.

EDUCATION CODE SECTION 56341

This proposed amendment strikes a reference to EC Section 56507 which has been rewritten by this act. The amendment does not prohibit the use of attorneys at IEP meetings by parents or local educational agencies since that would be in conflict with Title 34 of the Code of Federal Regulations.

EDUCATION CODE SECTION 56344

This proposed amendment clarifies that the 50-day timeline for developing an IEP from the date of receipt of the parent's written consent for assessment does not count days of school vacation in excess of five schooldays.

EDUCATION CODE SECTION 56364

This proposed amendment from the Sunset Review Report clarifies existing code language on how disabled and nondisabled pupils are to participate with one another in school activities, including nonacademic and extracurricular services and activities.

EDUCATION CODE SECTION 56500.1

This proposed amendment makes a technical change to the citation of federal law covering procedural safeguards.

EDUCATION CODE SECTION 56500.2

This proposed amendment makes a technical change to the citation of federal law covering the resolution of complaints.

EDUCATION CODE SECTION 56500.3

This proposed amendment adds a new section on mediation. (Current state law requires a parent or public education agency to file for a due process hearing in order to get a mediation conference with a state mediator.) The following is a listing of the main provisions of this section:

- Provides legislative intent language stating that parties to special education disputes be encouraged to seek resolution through mediation prior to filing a request for a due process hearing; and that mediation be an informal process conducted in a nonadversarial atmosphere to resolve educational issues to the satisfaction of both parties.
- Prohibits attorneys, as defined, or other independent contractors used for legal advocacy from attending or otherwise participating in the prehearing-request mediation conference.

o Permits the parent and public education agency to invite nonattorney representatives to participate in the mediation conferences; and permits the parent and public education agency to consult with an attorney prior to or following a mediation conference.

o States that requesting or participating in a mediation conference is not a prerequisite to requesting a due process hearing.

o Requires that requests for a mediation conference be filed with the Superintendent of Public Instruction.

o Requires the party filing for a mediation conference provide the other party to the mediation with a copy of the request at the same time it is filed.

o Requires the mediator to be knowledgeable in the laws and regulations governing special education; an requires the mediator to be knowledgeable in the process of reconciling differences in a nonadversarial manner, and be under contract with the California Department of Education.

o Requires the mediation conference to be scheduled within 15 days of receipt by the Superintendent of Public Instruction of the request for mediation.

o Permits the district superintendent, the county superintendent, or the director of the public education agency, or his or her designee to resolve the issue(s) as long as the resolution does not conflict with state or federal law and is satisfactory to both parties.

o Requires that a copy of the written resolution be mailed to each party within 10 days following the mediation conference.

o Provides the option to the party filing for the mediation conference to file for a state-level hearing if the mediation conference fails to resolve the issues to the satisfaction to all parties.

o Permits the mediator to assist the parties in specifying any unresolved issues to be included in the hearing request.

o Requires any mediation conference to be held at a time and place reasonably convenient to the parent and pupil.

o Requires the mediation conference to be conducted in accordance with regulations adopted by the State Board of Education.

o Permits the parties to mediation to meet informally to resolve any issue(s) to the satisfaction of both parties prior to the mediation conference if the party initiating the mediation conference so chooses.

o Requires that the procedures and rights contained in this section shall be included in the notice of parent rights attached to the pupil's assessment plan pursuant to Section 56321.

EDUCATION CODE SECTION 56501

This proposed amendment makes a technical change to the provision covering due process hearings and hearing rights and adds a new due process hearing right - the right to request a mediation conference at any point during the hearing process. This is in addition to the right to mediation conference under Section 56500.3. The purpose of the technical amendment in subdivision (a) is to clarify that the right to the hearing, as far as a pupil per se is concerned, is limited to a pupil who is 18 years of age or older. The definition of "parent" in EC Section 56028, includes any adult pupil for whom no guardian or conservator has been appointed. Permits attorneys and advocates to participate in mediation conferences scheduled after the filing of a request for a due process hearing.

EDUCATION CODE SECTION 56502

This proposed amendment makes technical changes in the provisions pertaining to the procedures for initiating a due process hearing and the timelines. The section is also amended to require the Superintendent of Public Instruction to provide both parties to the hearing with a list of persons and organizations within the geographical area that can provide free or reduced cost representation or other assistance in preparing for the due process hearing. Currently, the superintendent just informs the public education agency of its responsibility to advise the parent of free or low-cost legal services and other relevant services available with the geographical area. The public education agencies have had a difficult time keeping an updated list and parents have complained about this.

EDUCATION CODE SECTION 56503 (REPEAL AND ADD)

This proposed amendment repeals the current section pertaining to mediation since that is now covered in Section 56500.3. It also adds a new Section 56503 stating that nothing in the procedural safeguards chapter precludes the parties to a hearing from agreeing to use a mediation conference, or resolving their dispute in an informal, nonadversarial manner, even though a request for a state-level hearing has been filed, or even if the hearing has commenced.

EDUCATION CODE SECTION 56504.5

This proposed amendment adds a new section setting parameters for the California Department of Education to meet in contracting with a single, nonprofit organization or entity to conduct mediation conferences and due process hearings, including knowledge in administrative hearings and laws and regulations governing special education; no conflict of interest; not in the business of providing, or supervising, special education, related services, or care to children and youth.

EDUCATION CODE SECTION 56505

This proposed amendment makes technical changes to the provisions concerning the conduct of hearings and rights of the parties to the hearing. A new provision requires the hearing officer to encourage the parties to a hearing to consider the option of mediation as an alternative to a hearing. It states that the findings and decisions shall be made available to the public consistent with federal law and shall be transmitted to the Advisory Commission on Special Education pursuant to federal law. It also adds a new right to be informed by the other parties to the hearing, at least 10 days prior to the hearing, what those parties believe are the issues to be decided in the hearing and their proposed resolution of those issues. It also adds that an appeal of a due process hearing decision to a court of competent jurisdiction must be made within 90 days of receipt of the hearing decision.

EDUCATION CODE SECTION 56505.1

This proposed amendment adds a new section covering the rights of a due process hearing officer: question a witness on the record prior to any of the parties doing so; request that conflicting experts discuss an issue or issues with each other while on record; visit the proposed placement site(s) when the physical attributes of the site(s) are at issue; call a witness to testify, as specified; order that an impartial assessment, funded through the contract, be conducted for the purposes of the hearing and continue the hearing until the assessment has been completed; and call as witnesses independent medical specialists qualified to present evidence in the area of the pupil's medical disability.

EDUCATION CODE SECTION 56507 (REPEAL AND ADD)

This proposed amendment repeals the current section concerning the restrictions on the use of attorneys in individualized education program meetings, mediation conferences, and due process hearings. It adds a new Section 56507 requiring either party to a due process hearing intending to be represented by an attorney to notify the other party 10 days prior to the hearing and failure to notify shall constitute good cause for a continuance. It

provides that the award of reasonable attorneys' fees to the prevailing parent or guardian may only be made by a court of competent jurisdiction pursuant to federal law. It prohibits public education agencies from using federal special education funds for legal counsel or other advocacy costs related to a due process hearing or appeal, and prohibits the use of federal special education funds to be used to reimburse parents who prevail and are awarded attorney fees. It requires the hearing decision to indicate the extent to which each party has prevailed on each issue heard and declared, including issues involving other public agencies named as parties to the hearing.

EDUCATION CODE SECTION 56508

This proposed amend adds a section expressing legislative intent that the California Department of Education develop training materials that can be used locally by parents, public education agencies and others, and conduct workshops on alternative resolutions for resolving differences in a nonadversarial atmosphere with the mutual goal of providing a free and appropriate public education for children and youth.

EDUCATION CODE SECTION 56601

This proposed amendment to the new subdivision (a) is a technical amendment which will allow the special education local plan areas and the districts to submit information (statistical data, program information, and fiscal information) to the Superintendent of Public Instruction in order for the superintendent to carry out the special education program evaluation responsibilities pursuant to Section 56602. This information will be used to answer questions from the Legislature and other state and federal agencies on program, policy and fiscal issues of statewide interest.

The proposed new subdivision (b) would authorize the Superintendent of Public Instruction to collect and utilize social security numbers of pupils with disabilities as pupil identification numbers in order to assist the state in evaluating the effectiveness of the special education programs which cost $2.4 billion annually to provide. The Legislature continually asks how effective are special education programs and this will help the California Department of Education in answering these questions. It would not be mandatory for parents to submit social security numbers if, for any reason, they choose not to do so. In those cases, the Superintendent of Public Instruction shall assign another student I.D. number for purposes of evaluating special education programs. The States of Florida, Texas, Arkansas and Michigan are already using social security numbers for this purpose. Other states, such as Illinois and Nebraska, are considering this I.D. option. Some local educational agencies in California, such as Fresno County Office of Education, are already using social security numbers of pupils for I.D. purposes. This provision will also help the State in evaluating the effectiveness of programs preparing pupils with disabilities for work situations once they have left the K-12 system.

EDUCATION CODE SECTION 56731

This proposed amendment would add a new code section stating legislative findings and declarations that adjudicated individuals with exceptional needs in juvenile court schools require instructional programs in special education for up to 246 schooldays, depending on the number of schooldays court schools operate in that county, each fiscal year in order to comply with federal regulations. The amendment also requires the Superintendent of Public Instruction to develop a funding formula, in consultation with the Legislative Analyst and the Director of Finance, for the distribution of increased federal funds under Part B of IDEA in an amount not to exceed three million dollars to augment instructional units for the special education programs in juvenile court schools, beginning in fiscal year 1993, to cover the required number of days of instruction. The Federal Office for Civil Rights is putting the pressure on state juvenile court school programs to provide additional days of instruction to incarcerated individuals with exceptional needs. The Los Angeles County Office of Education is currently the focus of OCR's attention which could expand statewide and lead to added state costs if this situation is not addressed.

NONCODIFIED SECTIONS

There is no reimbursement required by this act and no state appropriation is necessary since the act implements a federal law or regulation and involves only "costs mandated by the federal government." In a couple of instances, (Section 56138 and 56731),
additional new federal funds will be necessary in 1993 and thereafter to cover the costs of these provisions.

The other noncodified code sections cover double joining language with Assembly Bill 2267, Assembly Bill 2632, and Senate Bill 2026.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is 2230 L Street, Sacramento, CA 95816.

On August 24, 2012, I served the foregoing documents as described below on the interested parties in this action as follows:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION AND ITS EDUCATION LEGAL ALLIANCE IN SUPPORT OF PLAINTIFF LOS ANGELES UNIFIED SCHOOL DISTRICT

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X By United States Postal Service. I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the addresses listed below and:

X Deposited the sealed envelope or package with the United States Postal Service, with the postage fully prepaid for first class mail.

☐ Placed the envelope or package for collection and mailing by first class mail, following my company's ordinary business practices. I am readily familiar with this business' practice for collection and processing correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Executed on August 24, 2012, in Sacramento California

Van T. Vu
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Association and its Education Legal
Alliance